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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

CITY OF MOUNT VERNON and JAMES GLEASON, Individually and as Commissioner of the Fire Department of the City of Mount Vernon, New York,

Petitioners,

vs.

MATTHEW T. STONE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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The certiorari petition filed by the City of Mount Vernon (hereinafter "the City") is based upon a simple proposition of law: when the essence of an employer's mission is to respond to unlikely emergencies, the ADA permits the employer to require that its employees be capable of responding to those emergencies.

The Second Circuit erred in this case because it held that a jury may conclude that the City is precluded from considering firefighting to be an essential duty of a firefighter's job, simply because some firefighters are asked to fight fires infrequently. As explained in the City's petition, this holding not only contradicts common sense; it also contradicts the applicable statute and regulations. A fire department must be able to consider firefighting to be an essential duty of all firefighters, even if some firefighters are required to perform that duty only rarely.

Mr. Stone's brief in opposition to the petition for certiorari completely disregards this basic legal issue. Instead, Mr. Stone stresses that the Second Circuit held that the case must be decided on its particular facts. Mr. Stone then argues that this is a fact-dependent case that is unsuited for review by this Court. The flaw in this argument is that the Second Circuit was able to conclude that this is a fact-dependent case only because of the error of law described above. The *only* evidence in the record cited by the Second Circuit or by Mr. Stone to support the conclusion that firefighting may not be an essential duty of the City's firefighters is that some of the City's firefighters perform it infrequently.

Mr. Stone goes a step further and states that firefighters assigned to the Fire Prevention Bureau *never* fight fires. This is a misstatement of the record, as explained on page 13 of the City's petition. One of the two Fire Prevention Bureau firefighters who were deposed testified that he did fight fires in

the course of his duties. Even if Mr. Stone were correct about this factual assertion, however, the legal issue at the root of this case would remain the same. Whether the firefighters in question perform firefighting duties moderately infrequently or extremely infrequently is not a crucial distinction.[1]

Mr. Stone then tries to distinguish the cases cited in the City's petition by picking apart their particular facts. This exercise misses the point — the Eleventh Circuit in *Holbrook* and the Fourth Circuit in *Champ* recognize, in direct contradiction of the Second Circuit's decision here, that the ADA permits a municipality to require all its emergency response personnel —even those assigned to ancillary jobs — to be able to respond to even the most unlikely emergencies. The Circuit Courts of Appeals are thus divided on this issue.

Mr. Stone and the Second Circuit argue as if firefighters in the Fire Prevention Bureau have a different job from other firefighters. This view has no support in the record. The Fire Prevention Bureau is simply an assignment for firefighters. All firefighters, regardless of their bureau assignment, take the same civil service test, belong to the same collective bargaining unit, have the same job title, are on the same seniority list, and receive the same pay. There is no such thing as a job of "Fire Prevention Bureau Firefighter." There are only firefighters who are assigned for a period of time to the Fire Prevention Bureau. There is nothing at all in the record to contradict the City's position that all firefighters, regardless of bureau assignment, must be available to fight fires if necessary in an emergency.

Mr. Stone argues that in case of an emergency, the City does not call upon firefighters assigned to the Fire Prevention

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1. Similarly, Mr. Stone's statements about firefighters assigned to the Fire Alarm Bureau are also unsupported by the record, as explained on page 8, footnote 3 of the City's petition.

Bureau; instead, it calls for help from neighboring fire departments. This may be true in ordinary circumstances. But the City must be prepared to respond to emergencies that neighboring fire departments cannot respond to, for example when the emergency affects neighboring communities as well as Mount Vernon. Mr. Stone and the Second Circuit would deny the City's right to staff itself in anticipation of such emergencies, simply because they occur rarely. But preparation for such emergencies, unlikely as they may be, is at the core of a fire department's mission.

This case threatens to turn the ADA into a cruel caricature of itself. Police departments in low-crime areas would not be able to require their police officers to be good marksmen, simply because most of them will never be called upon to fire a gun. The civil service test for firefighters in low-risk communities would have to be altered to eliminate tests of physical strength and endurance. The ADA does not require such absurd results, and this Court should take this opportunity to say so.

CONCLUSION

For these reasons as well as those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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